Supreme Court of the United States

OCTOBER TERM—1942

No. 610

EMANUEL WEISS,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER WEISS

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

ALFRED J. TALLEY,
JOHN SCHULMAN,
M. M. KREINDLER,
HARRY G. ANDERSON,
SAMUEL BADER,
GERALD WEATHERLY,
of Counsel.

INDEX

CASES CITED.

Supreme Court of the United States

OCTOBER TERM—1942

No. 610

EMANUEL WEISS,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER WEISS

The weight of respondent's attack upon the petition is directed to the sufficiency of the record to support this Court's jurisdiction (see Respondent's Brief, pp. 38-39, 46-47), and this reply shall be confined to that contention.

Inherent in respondent's argument is the outmoded—indeed, never accepted—conception that constitutional privileges are preserved only by magic incantation couched in technical terms.

For that reason, the District Attorney would limit the terms of the remittitur to specific points argued in petitioner's brief presented to the New York Court of Appeals. No regard is thus given to the cumulative force of the points which were raised and which culminated in counsel's argument that

> "A fair trial according to law is a substantial right. Such a trial is more than an adherence to prescribed forms. Implied in that right is that the trial tribunal

> will respect the constitutional rights of the accused; that the fundamental rules of evidence shall not be departed from; that the prosecuting officer shall discharge his duties fairly and not seek a conviction by unfair means. Finally, it implies that the trial court's charge to the jury should be the safeguard of fairness and impartiality and the guarantee of judicial indifference between the contending parties. The trial here falls far short of these standards." *

On this theory, respondent also disregards the issue upon which the divergence arose in the Court of Appeals. For example, Lehman, Ch. J., said (Record 4073, 289 N. Y. 225):

> "The errors and defects in this case are, it seems clear to me, many. Judge Loughran has set forth some which in his opinion cannot be disregarded. I agree with him that these errors and defects are present and these errors and defects and others shown by the record cannot be disregarded without hesitation lest in our anxiety that the guilty should not escape punishment we affirm a judgment tainted with errors obtained through violation of fundamental rights."

The learned Chief Justice reluctantly reached the conclusion that despite the errors and defects in the trial, the total result did not violate the fundamental right of due process. The dissenting Judges, however, stressed the element that the trial as a whole was not a fair one and thus brought within the orbit of consideration the question of due process.

At page 4090 of the Record (289 N. Y. 242), there is the statement of Judges Loughran and Desmond:

> "We believe the judgments of conviction should be reversed so that the defendants may have a fair chance to defend their lives before another jury."

---

* Weiss brief in the Court of Appeals, page 77, under heading "Conclusion."

And, finally, at pages 4090-4091 of the Record (289 N. Y. 243), the language of Judge Rippey is:

> "In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses, so unfair in fact as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled until his guilt is established by legal evidence beyond a reasonable doubt. * * * In spite of the summary of the contentions of the People contained in one of the opinions for affirmance, an analysis of the whole record persuades me that the evidence was insufficient as matter of law to sustain the conviction of any of the defendants of murder in the first degree beyond a reasonable doubt."

Can it therefore be gainsaid that, even if the explicit statement in the remittitur be disregarded, the question of fundamental fairness—due process under the Fourteenth Amendment as construed by this Court—was necessarily involved, considered and decided in this case by the Court of Appeals?*

We respectfully submit that the conclusion urged in petitioner's brief in the Court of Appeals presented an issue of due process not only in its specific reference to the "constitutional rights of the accused," but also in its

---

* Moreover, in the brief presented by counsel for Buchalter, upon the motion for re-argument in the Court of Appeals, and which was adopted by counsel for Weiss (see R. 4120), the point that due process of law was denied to the defendants in contravention of the 14th Amendment of the Federal Constitution, was squarely raised. That brief is part of the record before this Court (R. 4113-4114; 4105).

The point was necessarily passed on because the Court of Appeals wrote an opinion Per Curiam on the motion for re-argument (289 N. Y. 244), which is likewise printed in the record (R. 4120-4121). Even under the authority of the cases cited in respondents' brief (page 47 bottom), it suffices if the Federal question is raised on the motion for re-argument and passed on.

description of the attributes of fair trial, and in its claim that "the trial here falls far short of these standards." This issue is not made less a part of the record, as the District Attorney seems to argue, because counsel failed to state in *haec verba* that the constitutional rights referred to were those under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

This Court, in *Green Bay &c. Company* v. *Patten Paper Company*, 172 U. S. 58, 67-68, said:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. * * * 'If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.' *Powell* v. *Brunswick County*, 150 U. S. 433, 440; *Saycard* v. *Denny*, 158 U. S. 180; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226."

Even in *Honeyman* v. *Hanan*, 300 U. S. 14, the very case mainly relied on by respondent, this Court, in distinguishing from that case the case of *Whitney* v. *California*, 274 U. S. 357, said (300 U. S. 23):

> "* * * The Court of Appeal of the State, as an addition to the record, entered an order stating that the question whether the California Criminal Syndicalism Act and its application were repugnant to the Fourteenth Amendment to the Federal Constitution was considered and passed upon by the court. While this court said that the record did not show that the defendant had raised or the state court had decided a federal question except as it appeared from that order, the record did disclose facts indicating the presence of the federal question which the order of the state court said was actually presented and decided, and accordingly jurisdiction was entertained * * *."

See also:

Whitney v. *California*, 274 U. S. 357, 360-362;
Cissna v. *Tennessee*, 246 U. S. 289, 293-294;
Mallinckrodt Works v. *St. Louis*, 238 U. S. 41, 49;
San Jose Land & Water Company v. *San Jose Ranch Co.*, 189 U. S. 177, 179-180.

And see the other cases cited by respondent (Brief, pp. 46-47), namely:

Capital City Dairy Company v. *Ohio*, 183 U. S. 238, 244;
Rector v. *City Deposit Bank*, 200 U. S. 405, 412;
Dewey v. *Des Moines*, 173 U. S. 193, 199.

We urge, therefore, that not only from the remittitur, but also from the brief submitted by petitioner Weiss to the Court of Appeals, and from the opinions written in that Court, it is manifest that the question of due process appears by "clear and necessary intendment" and that "the State Court could not have given judgment without deciding it."

Respectfully submitted,

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

ALFRED J. TALLEY,
JOHN SCHULMAN,
M. M. KREINDLER,
HARRY G. ANDERSON,
SAMUEL BADER,
GERALD WEATHERLY,
of Counsel.